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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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USA BASEBALL, THE NATIONAL HIGH
SCHOOL BASEBALL COACHES ASSOCIATION,
DR. PETER BERG, JUAN HERNANDEZ, DENNIS
CANALE, MEL ZITTER, MICHAEL CRUZ, TITO
NAVARRO, JOHN TORRES, EASTON SPORTS,
INC., WILSON SPORTING GOODS CO.,
RAWLINGS SPORTING GOODS COMPANY, and
HILLERICH & BRADSBY CO.

Plaintiffs,

Civil Action No. 07-CV-3605 (JGK)

- against -

CITY OF NEW YORK,

Defendant.

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**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO STRIKE
THE REPLY DECLARATION OF JERALD HOROWITZ**

Plaintiffs file this Memorandum of Law in Support of Their Motion to Strike the Reply Declaration of Jerald Horowitz because it is inadmissible on multiple grounds. Mr. Horowitz purports to offer testimony on the number of interstate high school games involving New York City high schools. See Reply Decl. of Jerald Horowitz at ¶¶ 4-7 (“Reply Decl.”). But, of course, as a lawyer in this case, he has no personal knowledge of this subject. He relies on hearsay, an examination of websites, but does not and cannot claim to be an expert who can properly rely upon hearsay. See FRE 703 (Expert testimony may, under limited circumstances, be based on “facts or data that are otherwise inadmissible” if such facts are “of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject”); FRE 702 (requiring expert qualified “by knowledge, skill, experience, training, or education”).

Finally, as described below, Mr. Horowitz’s methodology is totally incorrect, because it is based upon false assumptions which he apparently never bothered to verify. Therefore, even if he were competent to offer this testimony, it would fail as unreliable under FRE 702 and *Daubert v. Merrell Dow Pharms.*, 509 US 579 (1993).

Only the last point requires any elaboration. Mr. Horowitz’s conclusion in his Declaration that only 1.25% of New York City high school baseball games take place between New York City high school teams and out-of-state teams is based entirely on third-party websites. See fn. 1 to Reply Decl. His conclusions are thus based on the assumptions that these websites are both accurate and complete. Both assumptions are incorrect.

In fact, the testimony of the real experts in this case, New York City baseball coaches, reveals the dangers of admitting the purported facts in the Reply Declaration. To illustrate, Mr. Horowitz notes that he obtained “*all* schedules for such games played by public school

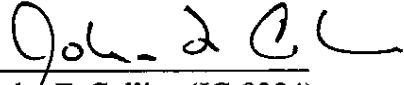
students . . . from the Public School Athletic League website (<http://psal.org>).” (Emphasis added.) But this website contains only PSAL games (i.e. games in which one NYC public school plays another NYC public school) and omits any non-PSAL game. See Second Declaration of Dennis Canale. For example, James Madison, Tottenville, and George Washington all play games against Xaverian, yet none of these games appear on the PSAL website. See Second Canale Decl. at ¶ 4. Thus, reliance on this website for full schedules requires an assumption that no NYC public school ever plays a game against a non-NYC public school. More importantly, contrary to Exhibit D30 to the Reply Decl., each of the high schools listed above plays at least two games against teams from outside the State of New York. *Id.* at ¶ 3. Thus, reliance on this hearsay drastically understates the number of out-of-state games PSAL teams play every year. Second Canale Decl. at ¶ 7.

The other sources fare no better.¹ Another hearsay website utilized by Mr. Horowitz, <http://highschoolsports.net>, is inaccurate on its face. For example, this website indicates that the varsity and junior varsity baseball teams of Archbishop Molloy High School played only a single game in 2006-2007. See <http://highschoolsports.net>; Second Canale Decl. at ¶ 5. Anyone with the slightest familiarity with New York City high school baseball would have realized that this site is patently unreliable.

¹ In the same footnote, Mr. Horowitz explains that “other websites viewed for private school schedules included the Catholic High School Athletic Association website . . .” Reply Decl. at fn.1. It is unclear why Mr. Horowitz even lists this site. The New York Catholic High School Association website does not list any schedules for baseball whatsoever. See http://www.nychsaa.org/event_search.php.

For the reasons stated above, Plaintiffs respectfully request that this Court strike the
Reply Declaration of Jerald Horowitz.

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